Belkin Burden Wenig & Goldman, LLP

UPDATE

BBWG

EDITORS
Magda L. Cruz
Aaron Shmulewitz
Kara I. Rakowski

NOVEMBER 2011 | VOLUME 13

Inside This Issue

TRANSACTIONAL LAW UPDATE

IT'S NOT TOO SOON TO BE THINKING ABOUT THE 2018 SPRINKLER LAW IN YOUR COMMERCIAL LEASE

By Daniel Altman

In 2004, the New York City Building Code was amended to add Local Law 26/04 requiring all owners of office buildings one hundred (100) feet or higher to have sprinklers installed throughout their building on all floors by July 1, 2018. In addition, a report must be prepared by the owner's architect or engineer certifying that the installation is completed by July 1, 2018. Interim reports are required to be filed approximately every six (6) years (beginning in July 2005) by owners. You should check with your counsel to confirm that you are in compliance with the law with respect to filing the interim reports.

How much will it cost to comply with this law? In polling a few architects and engineers, they have indicated that the installation of new sprinklers throughout an office building could cost anywhere from $4.50 - $6.00/ sq. foot, which means that, in a 50,000 sq. foot office building, the cost of installation, at a conservative $5.00/

continued on page 7

TRANSACTIONAL LAW UPDATE

FOREIGN BUYERS BEWARE: CLOSING AND CARRYING COSTS IN CO-OP AND CONDO APARTMENTS

By Melanie A. Capobianco

The combination of our current depressed economy, a low dollar exchange rate, and a high inventory of available real estate, makes investment in New York City co-op and condo apartments particularly attractive now to foreign investors.

A prudent foreign purchaser must consider various factors in evaluating whether a particular apartment would be a good investment, typically discovered during the due diligence process prior to entering into a contract to purchase an apartment.

Beyond the due diligence process, there are unique considerations related to investing in real estate in the U.S. (and New York City in particular) that should be given considerable weight by a foreign investor when evaluating whether to proceed with such a purchase.

One cost that often surprises foreign purchasers is the New York State "Mansion Tax," equal to 1% of the

continued on page 2

LITIGATION LAW UPDATE

JUDGMENTS DON'T LAST FOREVER

By David M. Skaller

A money judgment obtained by a plaintiff in New York State is only valid and enforceable for twenty years. However, where the judgment is a lien on the real property of a judgment debtor, then the lien is only valid and enforceable for ten years. In order to extend the lien on real property for more than ten years based upon the judgment, the plaintiff seeking to extend the lien must commence a new action and sue on the old judgment, and thereby acquire a new judgment with a fresh ten year lien term. This action must be taken in advance of the expiration of the first ten years so as to avoid there being a lien gap which would make it possible for other creditors to file a lien and step in and take priority over your lien.

If a defendant has no real property or does not docket the judgment in the county where the property is located, then that plaintiff need not take the steps to extend the lien, inasmuch as the judgment would be valid and enforceable for twenty years from the date that it is docketed in court.

David M. Skaller (dskaller@bbwg.com) is a partner in the Litigation Department at BBWG, who specializes in Landlord and Tenant litigation.

TRANSACTIONAL LAW UPDATE

FOREIGN BUYERS BEWARE: CLOSING AND CARRYING COSTS IN CO-OP AND CONDO APARTMENTS

continued from page 1

purchase price for a residential property costing $1 million or more. In addition, if the seller is a sponsor, a buyer may also often be required to pay the sponsor's New York City real property transfer tax (1.425% of the purchase price if more than $500,000 and 1% if less than that) and New York State real estate transfer tax (0.4% of the purchase price).

Beyond the initial closing, foreign purchasers should also be aware of two other items that can result in future costs or a decrease in profit margins upon resale--increase in real estate taxes upon expiration of tax abatement programs, and income tax withholding upon resale.

Some newly-built apartment buildings in New York City benefit from real estate tax abatement programs. Although a great incentive at initial purchase, a foreign buyer must keep in mind that this relief is temporary.

One example is the 421-a tax abatement program. Under this program, the building (if a co-op) or individual units (if a condo) will typically enjoy relief from full property taxes for a limited period, normally 10-20 years depending on the building's location. However, full taxes are typically phased in ratably every two years, thus increasing an apartment owner's real estate tax liability concomitantly. In addition to these pre-set tax increases, property taxes are also subject to further increase based on hikes in the property's assessed valuation. Foreign buyers must be made aware of this potential "double whammy," which could significantly impact the property's attractiveness to future buyers upon resale.

A foreign buyer should be cautious about tax information obtained from promotional materials or brokers, and must consult with experienced counsel about the nature of any tax abatement programs.

The second potential risk that foreign buyers should be aware of is tax withholding upon resale.
The sale of U.S. real property by a foreigner is subject to withholding under the Foreign Investment in Real Property Tax Act ("FIRPTA"). Under FIRPTA, if the seller is a foreign person, 10% of the sale price must be paid to the IRS at the time of the resale closing. This withholding impacts the amount of funds available at closing and decreases potential profits from a resale of the foreigner's initial investment.

Foreign purchasers should consult with a tax attorney and accountant regarding these and other U.S. tax implications related to the sale and ownership of real property in the U.S.

If you are a foreign investor seeking to take advantage of this buyer's market, please feel free to contact BBWG for assistance, and we would be happy to advise you.

Melanie A. Capobianco (mcapobianco@bbwg.com) is an associate in the Firm's Transactional Department.

BBWG NOTABLE ACHIEVEMENTS

The Annual List of the top attorneys in the New York Metropolitan Area, published in Super Lawyers 2011, included six BBWG partners. Congratulations to SHERWIN BELKIN, HOWARD WENIG, JEFFREY GOLDMAN, AARON SHMULEWITZ and LEWIS LINDENBERG for being named "Super Lawyers" again in 2011, and to CRAIG PRICE for being named a "Rising Star."

SHERWIN BELKIN, a partner in BBWG's Administrative Law and Appeals Departments, responded to inquiries in the October 6 and August 21 *Sunday Real Estate Section* of the New York Times, regarding the $2,500 rent threshold under the new luxury deregulation legislation that became effective June 24, 2011, and regarding the right of a tenant to back out of a lease prior to commencement.

AARON SHMULEWITZ, head of BBWG's Co-op/Condo Practice, responded to inquiries in the September 11 and July 31 *Sunday Real Estate Section* of the New York Times regarding a co-op's obligation to repair damage in an apartment caused by Hurricane Irene, and a co-op's rights to restrict use of a roof garden to shareholders only. MR. SHMULEWITZ was also quoted in the August edition of *The Real Deal* in an article on undisclosed side deal agreements between apartment purchasers and sellers.

MAGDA L. CRUZ, a partner in BBWG's Appeals Department, was quoted in a November 4 New York Law Journal front page article entitled *"Court Revives Landlord's Bid for Damages From Tenants"* reporting on a nuisance case in which MS. CRUZ and litigation partner JOSEPH BURDEN successfully represented the owner before the Appellate Division, First Department. Another BBWG appellate victory was the subject of an article authored by MS. CRUZ and featured in the October 2011 New York Housing Journal of the Community Housing Improvement Program, concerning luxury deregulation orders in buildings which received J-51 tax benefits.

ORIE SHAPIRO, a partner in BBWG's Administrative Law Department, with PHILLIP BILLET, an Administrative Law associate, successfully handled an Article 78 proceeding against the New York City Environmental Control Board involving outdoor advertising sign regulation that was noted in the October 15, 2011 edition of City Land.

MARTIN HEISTEIN, chair of BBWG's Administrative Law Department, was a speaker at a September 14 seminar co-sponsored by the Rent Stabilization Association and Community Housing Improvement Program on "Understanding the City's New Clean Heat Requirements—Converting to Cleaner Oil and Natural Gas," and how an owner can recoup conversion expenses by filing for MCI rent increases and J-51 tax abatements.

Litigation associates LISA GALLAUDET and NOELLE PICONE ran the NYC Marathon on November 6, finishing among the top 25% of women runners.

NEW AIR-CONDITIONING SURCHARGES

By Martin Heistein

The New York State Division of Housing and Community Renewal (DHCR) issued the 26th Annual Update to the Operational Bulletin, which establishes the amounts that owners may charge tenants for the use of an air conditioner unit.

In buildings where tenants do not pay electricity (electrical inclusion buildings), owners may charge tenants $349.53 per year per air conditioner ($29.13 per month per air conditioner). This is an increase from last year's surcharge of $321.94 per year per air conditioner. Owners should check their records and make sure to adjust the amount that tenants are paying to comply with the new surcharge. The increased charge reflects an 8.57% increase in the price of electricity for electrical inclusion buildings.

In buildings where tenants pay for their own electricity (electrical exclusion), an owner may charge a tenant $5.00 per month per air conditioner, if the air conditioner protrudes beyond the window line and the tenant purchases and installs the air conditioner between October 1, 2011 and September 30, 2012.

Finally, where a new air conditioner is purchased and installed by the owner with the written consent of the tenant, the owner may increase the rent by 1/40 of the cost of the new air conditioner (in buildings that contain 35 or fewer apartments) or 1/60 of the cost of the new air conditioner (in buildings that contain more than 35 apartments)

For rent-controlled apartments, owners must apply for approval from the DHCR to collect the air conditioner surcharge. However, for rent-stabilized apartments, no DHCR approval is necessary.

Owners should be aware that the surcharge does not become part of the base rent and should NOT be included in calculating any increases to the base rent.

Most importantly, the monthly charges remain collectible during the entire year, even if the air conditioner is removed by the tenant during the winter months.

The Update is effective October 1, 2011, and covers any air conditioners installed from October 1, 2011 through September 30, 2012.

For more information, please contact Martin Heistein, head of BBWG's Administrative Law Department (mheistein@bbwg.com).

TRANSACTIONS OF NOTE

BBWG Closes on $6.3 million Condominium for Foreign Buyer after In-Court Settlement

CRAIG L. PRICE, a partner in BBWG's Transactional Department, MATTHEW BRETT, a partner in BBWG's Litigation Department, and associates CRAIG GAMBARDELLA and JAMIE CHAPMAN, represented a buyer in the purchase of a $6.3 million Fifth Avenue condominium apartment. In October 2010, a prominent Italian business-woman and resident of Monte Carlo, retained BBWG for the purchase of two condominium units. The closing of one unit – an $8 million condominium on East 58th Street – closed as planned. However, the closing of the second unit on Fifth Avenue did not.

The purchase contact for the Fifth Avenue condominium fixed the closing date as unit on November 10, 2010. BBWG's efforts to schedule a mutually agreeable date with the sellers, however, were unsuccessful as the sellers unjustifiably refused to set a fixed closing date. After many long negotiations among the sellers, the sellers' attorney, the buyer and BBWG – in both English and Italian - BBWG served a "time of the essence" letter upon the sellers and their attorneys. On the date fixed by the letter, the sellers and their attorney failed to appear and close title. As such, with the consent of the buyer, BBWG initiated an action for specific performance, breach of contract and fraud.

Within weeks of the filing, Mr. Brett was contacted by the bank which held the sellers' mortgage for the condominium. Mr. Brett was informed that the mortgagee was initiating a foreclosure action against the sellers, as the sellers defaulted in making payments required under their mortgage. The mortgagee also informed Mr. Brett that if it was successful in its foreclosure action, BBWG's client would lose its rights to purchase the unit.

To prevent this, BBWG proposed a global settlement of both the buyer's action, as well as the mortgage foreclosure action in foreclosure. Through this settlement, the buyer would agree to discontinue its action against the sellers if the sellers would allow the buyer to immediately close title to the condominium. Upon the closing of title, the purchase price for the condominium unit would be paid to the sellers and all funds necessary to pay the principle and interest of the mortgage in full, would be transferred to the mortgagee. The mortgagee would, in turn, discontinue its foreclosure action, thus allowing the buyer to maintain its rights to the premises. Finally, the seller agreed to reimburse BBWG's client for the substantial amount of legal fees she expended.

All parties agreed and executed stipulations memorializing this agreement. Upon filing all stipulations with the respective courts, the closing occurred on September 13, 2011, and the buyer took vacant possession of the condominium.

ROBERT A. JACOBS, a partner in BBWG's Transactional Department, and MELANIE A. CAPOBIANCO, an associate in the Department, represented a NYC hotel owner on the refinancing of its $35 million mortgage. MS. CAPOBIANCO also represented several Manhattan co-ops and condominiums on the refinancing of underlying mortgages and other debt totaling in excess of $10 million.

CRAIG INGBER, a partner in BBWG's Transactional Department, represented the owner of a midtown commercial building in the negotiation of a multi-story lease with a value in excess of $30 million. MR. INGBER also represented an institutional investor in the acquisition of an Upper West Side apartment building, another investor in the purchase of an apartment building in Chelsea, and an owner of an Upper East Side building in the negotiation of a pop-up lease with a national retailer.

MR. ALTMAN and SETH A. LIEBENSTEIN, an associate in the Transactional Department, represented an Upper East Side co-op on the refinancing of two underlying mortgages. MR. LIEBENSTEIN also represented another Manhattan co-op on the refinancing of its two mortgages.

MR. ALTMAN and ALLAN L. GOSDIN, an associate in the Transactional Department, represented the seller of an apartment building in Hamilton Heights for a sale price of $6.3 million.

Co-op | Condo Corner

By Aaron Shmulewitz

Aaron Shmulewitz heads the Firm's co-op/condo practice, consisting of more than 300 co-op and condo Boards throughout the City, as well as sponsors of condominium conversions, and numerous purchasers and sellers of co-op and condo apartments, buildings, residences and other properties. If you would like to discuss any of the cases in this article or other related matter, you can reach Aaron at 212-867-4466 or (ashmulewitz@bbwg.com).

CO-OP BUYER NOT ENTITLED TO RESCIND CONTRACT AND RECOVER DEPOSIT BASED ON BROKER MISREPRESENTATIONS REGARDING EXTENT AND FEASIBILITY OF THROUGH-THE-WALL AIR CONDITIONERS IN APARTMENT

Rosenblum v. Glogoff Supreme Court, New York County

COMMENT | *The Court emphasized caveat emptor—-before signing the purchase contract, the buyer could have investigated the extent of air conditioner rights and the physical ability to install them.*

ILSA APPLIES TO CONDO UNITS; PURCHASERS MAY RESCIND CONTRACTS

Indomenico v. 123 Washington, LLC United States District Court, Southern District of New York

COMMENT | *The availability of ILSA to condo purchasers would appear to have been resolved long ago, but the Court apparently felt that there was sufficient uncertainty to warrant a long, scholarly opinion.*

CONDO HAS NO STANDING TO SUE SPONSOR ON BEHALF OF PURCHASERS UNDER ILSA

The Board of Managers of The Mason Fisk Condominium v. 72 Berry Street, LLC United States District Court, Eastern District of New York

CO-OP CAN OBTAIN INJUNCTION AGAINST EXCESSIVE NOISE FROM ROOFTOP BAR IN ADJACENT BUILDING, DESPITE ABSENCE OF FILED MUNICIPAL NOISE VIOLATION

61 West 62 Owners Corp. v. CGM EMP LLC Appellate Division, 1st Department

COMMENT | *The Court held that, despite the absence of a violation of record, the co-op still had the likelihood of success on the merits. Noise complaints in mixed-use locales are increasing, and co-op and condo boards should take note of the rights illustrated by this decision.*

CO-OP ENTITLED TO HAVE SHERIFF EXECUTE ON JUDGMENT AGAINST DELINQUENT SHAREHOLDER, AND TO SELL APARTMENT, EVEN THOUGH SHAREHOLDER DEPOSITED MONEY WITH COURT WITH REGARD TO ANOTHER DELINQUENT APARTMENT IN SAME CO-OP

Roshodesh v. Plotch Supreme Court, Queens County

COMMENT | *The Sheriff had already sold the apartment to a successful bidder, who was the named defendant in the lawsuit.*

MECHANICS LIENS FILED AGAINST CONDO UNITS THAT WERE TRANSFERRED PRIOR TO LIEN FILING ARE INVALID AGAINST THE TRANSFERRED UNITS

Myrtle Owner LLC v. Ro-Sal Plumbing & Heating Inc. Supreme Court, Kings County

COMMENT | *Filing requirements for mechanics liens in condo buildings are unique and esoteric. Contractors unpaid by condo developers often misfile lien notices, creating problems for the contractors and apartment purchasers, and sometimes allowing developers to escape payment enforcement scot-free.*

PHYSICIAN GRANTED A NON-EXCLUSIVE RIGHT TO USE CO-OP MEDICAL OFFICE ENJOYED A LICENSE, NOT A LEASE, CANNOT AVOID PAYMENT OBLIGATION TO LICENSOR

DEMD 860, LLC v. Toobian Supreme Court, New York County

COMMENT | *In rejecting the licensee's effort to escape his payment obligation to the office's owner on various technical grounds, the Court was apparently motivated by notions of equity in holding that a license at will can only be terminated by the licensor, not the licensee.*

ATTORNEY GENERAL'S DECISION UPHELD THAT CONDO SPONSOR MUST REFUND DOWNPAYMENT TO PURCHASER BECAUSE CLOSING DELAYED BEYOND ONE-YEAR DEADLINE STATED IN PURCHASE CONTRACT

Madison Park Owner LLC v. New York State Division of Human Rights Supreme Court, New York County

COMMENT | *The Court held that the Attorney General's decision was not arbitrary or capricious in light of the clear contractual provision that required the closing to occur by a stated date.*

CO-OP BUYER WHO FAILED TO CLOSE ON PURCHASE FORFEITS DOWNPAYMENT TO SELLER; FAILED TO APPLY TO MULTIPLE LENDERS FOR LOAN AS REQUIRED BY PURCHASE CONTRACT

Safanovskaya v. Ostrow Appellate Term, 2nd Department

COMMENT | *The Court emphasized a clear contractual provision that the purchaser failed to satisfy.*

CO-OP BOARD CANNOT RESTRICT APARTMENT USE TO "JOINT LIVING WORK QUARTERS FOR ARTISTS" IF CERTIFICATE OF OCCUPANCY AND ZONING PERMIT RESIDENTIAL USE

Wirth v. Chambers-Greenwich Tenants Corp. Appellate Division, 1st Department

COMMENT | *The Court held that the shareholder could sue the Board for refusing to consider his alteration plans.*

CONDO BUYER DEFAULTED BY NOT CLOSING ON NON-CONTINGENT PURCHASE; SPONSOR ENTITLED TO RETAIN FULL DEPOSIT; ATTORNEY GENERAL'S DETERMINATION IN FAVOR OF SPONSOR UPHELD

Cheng v. New York State Office of the Attorney General Supreme Court, New York County

COMMENT | *The Court expressly rejected the purchaser's arguments, and held that an economic downturn and difficulty in obtaining financing (for a non-contingent contract) are not relevant to the purchaser's efforts to rescind the contract.*

CO-OP NOT LIABLE TO SHAREHOLDER FOR ALLEGED PRIVATE NUISANCE DUE TO EXCESSIVE NOISE EMANATING FROM NEIGHBOR MADONNA'S APARTMENT

George v. Board of Directors of One West 64th Street, Inc. Supreme Court, New York County

COMMENT | *While the Court dismissed the private nuisance claims, the Court refused to dismiss claims against the co-op for breach of warranty of habitability, holding that questions of fact existed which would have to be resolved at trial. Thus, the co-op could potentially still be held liable for failing to stop the alleged excessive noise.*

CONDO, COMMERCIAL UNIT OWNER, AND CO-OP CAN ALL BE SUED BY PERSON INJURED IN TRIP AND FALL ACCIDENT ON SIDEWALK IN FRONT OF COND-OP BUILDING; MANAGING AGENT AND STORE TENANT CANNOT BE SUED

Araujo v. Mercer Square Owners Corp. Supreme Court, New York County

COMMENT | *In reaching its determination, the Court analyzed bases of liability under the City's Administrative Code, common law, the Condominium's governing documents, and the store lease.*

CO-OP NOT LIABLE TO APARTMENT SELLER FOR LOSS OF PROSPECTIVE PURCHASER DUE TO CO-OP'S STATED UNCERTAINTY AS TO PROPRIETY OF SUNROOM ADDITION TO APARTMENT

Kiam v. Park & 66th Corporation Appellate Division, 1st Department

CO-OP THAT FAILED TO REPAIR DAMAGED APARTMENT FOR MANY YEARS IS LIABLE TO SHAREHOLDER

Goldstone v. Gracie Terrace Apartment Corporation Supreme Court, New York County

COMMENT | *In a case that has been heavily litigated for years, the Court held that the business judgment rule does not shield decisions by a co-op that has failed to satisfy its contractual obligations to the shareholder under its proprietary lease.*

TRANSACTIONAL LAW UPDATE

IT'S NOT TOO SOON TO BE THINKING ABOUT THE 2018 SPRINKLER LAW IN YOUR COMMERCIAL LEASE

continued from page 1

sq. foot, would run an owner approximately $250,000, not to mention the associated issues of coordinating such work with the tenant and the disruption it may cause to the tenant's business.

As an owner, you may ask yourself with respect to existing tenants, who will bear the cost of complying with this law, the owner or tenant? The answer depends upon what is in the office lease.

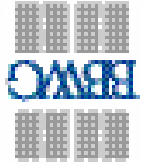
Arguably, if you use the most recent 2004 version of the Standard Form of Office Lease published by the Real Estate Board of New York, an unmodified paragraph 6 of the Standard Form captioned "Requirements of Law, Fire Insurance, Floor Loads" protects the Landlord from paying for the cost of the sprinkler installation insofar as the provision provides that the "Tenant, at its sole cost and expense, shall promptly comply with all present and future laws. . . which shall impose any violation, order or duty upon Owner or Tenant with respect to the demised premises, whether or not arising out of Tenant's use or manner of use thereof (including Tenant's permitted use) or, with respect to the building if arising out of Tenant's use of the demised premises or the building (including the use permitted under the lease)." Assuming you use the 2004 Standard Form Office Lease and the paragraph has not been changed or negotiated by tenant's counsel when you entered into the lease, an owner should be protected from not having to pay the cost of the sprinkler installation. If you don't use the 2004 Standard Form of Office Lease or the Standard Form has been modified and you have questions regarding compliance with the law, you should consult with counsel to determine your best course of action.

With respect to new tenants and tenants with whom you will be entering into lease extensions within the coming years, owners should pay particular attention to this provision since many attorneys who represent tenants in office leases are aware of this new law and are savvy at negotiating this provision with owners. In order to help such owners who are faced with drafting extensions or new leases with terms through July 2018, we have fashioned an owner-friendly sprinkler provision that will protect an owner from having to pay for this expensive compliance requirement. Please feel free to contact us for more information.

Daniel Altman (daltman@bbwg.com) heads the Firm's Transactional Department.

www.bbwg.com

New York Office | 270 Madison Avenue | New York, NY 10016 | Tel 212 .867 .4466 | Fax 212 .867 .0709
Connecticut Office | 495 Post Road East, 2nd Floor | Westport, CT 06880 | Tel 203 .227 .1534 | Fax 203 .227 .6044



Belkin Burden Wenig & Goldman, LLP
270 Madison Avenue | New York, NY 10016